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No. 99-6615

IN THE

Supreme Court of the United States

OCTOBER TERM, 1999

MICHAEL WAYNE WILLIAMS,

Petitioner,

—v.—

JOHN B. TAYLOR, Warden,

Respondent.

ON WRIT OF *CERTIORARI*
TO THE UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

MOTION FOR LEAVE TO FILE AND BRIEF *AMICUS CURIAE* OF THE AMERICAN CIVIL LIBERTIES UNION AND THE ACLU OF VIRGINIA IN SUPPORT OF PETITIONER

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MOTION OF THE AMERICAN CIVIL LIBERTIES UNION AND THE ACLU OF VIRGINIA FOR LEAVE TO FILE BRIEF *AMICUS CURIAE*

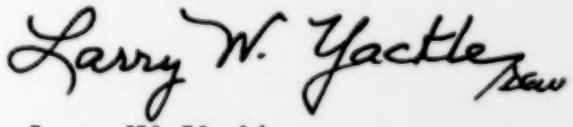
Pursuant to Rule 37.2(b), the American Civil Liberties Union (ACLU) and the ACLU of Virginia respectfully move this Court for leave to file the attached brief *amicus curiae* in support of petitioner. Petitioner has granted consent, but respondent has refused to consent.

The American Civil Liberties Union (ACLU) is a nationwide, nonprofit, nonpartisan organization with nearly 300,000 members dedicated to the principles of liberty and equality embodied in the Constitution. The ACLU of Virginia is its statewide affiliate. In support of those principles, the ACLU has appeared before this Court on numerous oc-

casions, both as direct counsel and as *amicus curiae*.

This case involves the potential execution of a person who contends that he was convicted in state court in violation of the Sixth and Fourteenth Amendments and that, in turn, he was denied proper consideration of his claims in federal habeas corpus proceedings. Because this case raises issues of fundamental importance to the ACLU and its members, we respectfully seek leave to file the attached brief *amicus curiae*, which focuses on the circuit court's interpretation of 28 U.S.C. §2254(e)(2).

Respectfully submitted,



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INTEREST OF *AMICI* [1]

The interest of *amici* is set forth in the accompanying motion for leave to file this brief *amicus curiae*.

STATEMENT OF THE CASE

The petitioner, Michael Wayne Williams, was convicted of murder and sentenced to death in Virginia. After his conviction was affirmed on direct review, Mr. Williams sought postconviction relief in state court. In that context, he alleged that the prosecution had violated *Brady v. Maryland*, 373 U.S. 83 (1963), by failing to disclose that it had promised a key witness, Jeffrey Alan Cruse, that it would not seek the death penalty in his case if he gave evidence against Mr. Williams. Mr. Williams moved the state court for discovery, expert assistance, investigative funds, and an evidentiary hearing to complete the factual record. In particular, he asked for any *Brady* materials in the state's possession that might have been helpful to the defense. He asked for psychological reports that might have been used at trial to undermine the credibility of Mr. Cruse as a prosecution witness. And he asked the state court to appoint an investigator to explore irregularities in the way the jury had been selected. Each of Mr. Williams' motions was opposed by the state and denied by the state courts, which ultimately denied all postconviction relief as well.

In subsequent habeas corpus proceedings in federal district court, Mr. Williams advanced both the claim that had been rejected in state court and two additional claims. One was a different *Brady* claim that the state had failed to dis-

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[1] Pursuant to Rule 37.6, counsel for *amici* states that no counsel for a party authored this brief in whole or in part and no person, other than *amici*, its members, or its counsel made a monetary contribution to the preparation or submission of this brief.

close a psychiatric report showing that Mr. Cruse was unreliable. The other claim was that a juror, Bonnie Stinnett, had given misleading answers to questions on *voir dire* and that the prosecutor, Robert Woodson, had failed to set the record straight. Ms. Stinnett denied that she was related to any of the potential witnesses when, in fact, she had previously been married to Deputy Sheriff Claude Meinhard. She also denied that she had ever been represented by any of the attorneys in the case when, in fact, Mr. Woodson had handled her divorce from Mr. Meinhard. The record showed that Mr. Woodson heard Ms. Stinnett make those misleading statements but did nothing to correct the misconceptions they created.

Initially, the district court determined that an evidentiary hearing should be conducted to develop the facts. The state asked the circuit court for an emergency stay of the order for a federal hearing. The circuit court directed the district court to reconsider the question whether a hearing should be held in light of 28 U.S.C. §2254(e)(2).[2] The district court, in turn, offered the view that §2254(e)(2) was inapplicable because it was not Mr. Williams' fault, but the state's fault, that the facts relevant to his federal claims were not developed in state court. Nevertheless, the district court understood that the circuit court had directed that §2254(e)(2) should be applied. Proceeding on that basis, the district court concluded that a hearing was foreclosed because Mr. Williams could not satisfy §2254(e)(2)(B).

On appeal, the circuit court made explicit what had been implicit in its previous remand order by holding that §2254(e)(2) applies to this case and that it precludes a federal evidentiary hearing to develop the facts underlying Mr. Williams' claims. Mr. Williams applied for a writ of *certiorari*, and this Court granted review with respect to one question:

> Whether 28 U.S.C. sec. 2254(e)(2), which prohibits a federal habeas court from holding an evidentiary hearing only "if the applicant has failed to develop the factual basis of a claim in State court proceedings," governs petitioner's claims where throughout state proceedings, the state suppressed the relevant facts, denied petitioner's discovery requests, denied all investigative and expert resources to investigate, develop, and discover claims, and denied an evidentiary hearing.

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[2] Section 2254(e)(2) was enacted as part of the Anti-Terrorism and Effective Death Penalty Act of 1996 (AEDPA), Pub.L.No. 104-132 (1996). The relevant portion of the statute provides:

> If the applicant has failed to develop the factual basis of a claim in State court proceedings, the court shall not hold an evidentiary hearing on the claim unless the applicant shows that --
>
> (A) the claim relies on --
>
> (i) a new rule of constitutional law, made retroactive to cases on collateral review by the Supreme Court, that was previously unavailable; or
>
> (ii) a factual predicate that could not have been previously discovered through the exercise of due diligence; and

(continued...)

[2] (...continued)

> (B) the facts underlying the claim would be sufficient to establish by clear and convincing evidence that but for constitutional error, no reasonable factfinder would have found the applicant guilty of the underlying offense.

SUMMARY OF ARGUMENT

This Court granted review to decide a two-part question of statutory construction: "Whether 28 U.S.C. §2254(e)(2) . . . governs petitioner's claims" in the circumstances of this case. Initially, the Court must identify the conditions that make §2254(e)(2) applicable in any case. Thereafter, the Court must decide whether those conditions are satisfied in this instance.

The circuit court below erroneously construed §2254(e)(2) to hold prisoners strictly liable for inadequate fact-finding in state court, even when the state is responsible for the inadequate record. That construction defies §2254(e)(2)'s text, its purpose, and its relationship to prior law.

To begin with, the circuit court's construction of §2254(e)(2) is inconsistent with the plain language of the statute itself. As Congress explained in the introductory clause of §2254(e)(2), the general prohibition on federal hearings is triggered "[i]f the applicant has failed to develop the factual basis of a claim in State court proceedings." On its face, therefore, the general rule against federal hearings applies only if it was the *prisoner* who failed to develop the facts in state court and does not apply if it was the *state* that failed to do so. Accordingly, the general prohibition does not apply to this case, in which state officials kept Mr. Williams from discovering and developing the factual basis of his federal claims.

The new statute divides the cases that can arise into four categories: (1) cases in which the state rather than the prisoner failed to develop the facts; (2) cases in which the prisoner failed to develop the facts and might have done so by exercising diligence; (3) cases in which the prisoner failed to develop the facts regarding a novel claim; and (4) cases in which the prisoner failed to develop the facts re-

garding a previously recognized claim even though he or she exercised diligence. In cases in the first category, the general rule against federal hearings is inapplicable. In cases in the second category, that rule is applicable and decisive. In cases in the third and fourth categories, the general rule applies, but it is not decisive because an exception to it may be warranted.

The circuit court acknowledged Mr. Williams' argument that this case falls in the first category because it was the state's fault that the facts related to his claims were not developed. Unlike every other circuit court to consider the issue, however, the court below held that the state's failure to provide Mr. Williams with relevant evidence did not prevent the state from relying on the inadequacy of the record to defeat his claim to a federal hearing. The circuit court did not appreciate that the state's responsibility for inadequate state fact-finding makes the general rule against federal hearings inapplicable. To the contrary, the circuit court held that a federal hearing is foreclosed in this case because Mr. Williams failed to overcome the state's interference with his attempts to develop the facts.

The circuit court's strict liability construction defeats the purpose of §2254(e)(2), which is to encourage the parties to litigate effectively in state court. It penalizes the prisoner for the state's default and, concomitantly, rewards the state for mishandling the fact-finding function. The circuit court's construction also neglects the large extent to which §2254(e)(2) embodies a central idea in this Court's previous decision in *Keeney v. Tamayo-Reyes*, 504 U.S. 1 (1992). This new statute requires a prisoner to give the state an opportunity to provide its own fact-finding machinery. It does not require the prisoner to surmount the obstacles that the state erects to thwart the prisoner's efforts.

ARGUMENT

I. THE CIRCUIT COURT'S STRICT LIABILITY CONSTRUCTION OF §2254(e)(2) CONFLICTS WITH THE TEXT OF THE NEW STATUTE

The circuit court below construed §2254(e)(2) to apply to this case, even though it was the state's fault that the facts supporting Mr. Williams' claims were not developed in state court. That is what Judge Easterbrook has described (and condemned) as a "strict liability" interpretation because it visits a penalty on the *prisoner* regarding inadequate state fact-finding for which the *state* was responsible.[3] The strict liability construction is flatly inconsistent with the text of the new statute.[4]

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[3] *Burris v. Parke*, 116 F.3d 256, 259 (7th Cir.), *cert. denied*, 118 S.Ct. 462 (1997). The President, too, disclaimed the strict liability construction even as he signed the new statute into law. Specifically, he said that "[§2254(e)] applies to situations in which 'the applicant has failed to develop the factual basis' of his or her claim. Therefore, [§2254(e)] is not triggered when some factor that is not fairly attributable to the applicant prevented evidence from being developed in State court." Statement of the President, 1996 U.S. Code & Admin. News 961-1, at 961-63.

[4] The district court took the view that the general rule against federal hearings established by §2254(e)(2) should not apply in this case because Mr. Williams made "numerous attempts to obtain the evidence required to discover" his claims, but his efforts were "repeatedly rebuffed." *Williams v. Netherland*, 6 F.Supp.2d 545, 547 (E.D.Va. 1998). As the district court explained, the state frustrated Mr. Williams' attempts to develop the facts "by denying all of [his] requests for discovery, expert assistance, and investigative funds, and by refusing to hold any hearing to take evidence outside of the trial record." *Id.* Nevertheless, the district court found itself compelled to apply the general prohibition on federal hearings, because the circuit court had "directed" that §2254(e)(2) must be applied without regard to the reasons why the facts were not developed in state court. *Id.* On appeal, the circuit court reaf-

(continued...)

Section 2254(e)(2) itself prescribes the conditions for its applicability. The general prohibition on federal hearings applies "[i]f *the applicant* has *failed* to develop the factual basis of a claim in State court proceedings." 28 U.S.C. §2254(e)(2)(emphasis added). As Judge Easterbrook has explained: "'Failure' implies omission -- a decision not to introduce evidence when there was an opportunity, or a decision not to seek an opportunity."[5]

Every other circuit court that has considered the question has held that the "applicant" did not "fail" to develop facts if it was the state that "failed" to do so.[6] As those courts have uniformly recognized, the general prohibition on federal hearings established by §2254(e)(2) is inapplicable to a case in which it was the state's fault that the facts were not developed in state court.[7]

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[4] (...continued)
firmed its strict liability construction by holding Mr. Williams accountable for failing to develop the facts, notwithstanding the hurdles the state placed in his path. *See Williams v. Taylor*, 189 F.3d 421, 426-27 (4th Cir. 1999).

[5] *Burris v. Parke*, 116 F.3d at 258.

[6] *Burris v. Parke*, 116 F.3d at 258-59; *Jones v. Wood*, 114 F.3d 1002, 1012-13 (9th Cir. 1997); *Love v. Morton*, 112 F.3d 131, 136 (3d Cir. 1997); *McDonald v. Johnson*, 139 F.3d 1056, 1059 (5th Cir. 1998); *Miller v. Champion*, 161 F.3d 1249, 1253 (10th Cir. 1998).

[7] The state insists that the cases cited in n.6 are distinguishable, because the prisoners in those cases raised relevant claims in state court and then were denied an opportunity to develop the facts related to those claims. Here, by contrast, the state complains that Mr. Williams failed to advance claims at all in state court (albeit for the reason that state officials kept him from discovering the existence of those claims). Respondent's Brief in Opposition to Petition for *Certiorari*, at 11 n.8. That argument draws a distinction without a difference. Nothing in §2254(e)(2) turns on whether a substantive claim was advanced in state court. All that

(continued...)

Against this background, the circuit court decision below stands out as a startling exception. The strict liability construction of §2254(e)(2) unaccountably ignores the express textual condition that the "applicant" must have "failed" to develop the facts. By the circuit court's account, that language carries no meaning at all, and §2254(e)(2) must be read as though it were not there. That will not do. Whenever possible, statutory terms must be given operative effect according to their "ordinary, contemporary, common meaning."[8]

The interpretation that other circuits have placed on the new statute tracks its general plan. Section 2254(e)(2) divides the field into four kinds of cases: (1) cases in which the state rather than the prisoner failed to develop the facts in state court; (2) cases in which the prisoner failed to develop the facts and might have done so by exercising diligence; (3) cases in which the prisoner failed to develop the facts regarding a novel claim; and (4) cases in which the prisoner failed to develop the facts regarding a previously recognized claim despite the exercise of diligence. In cases of the first kind, the general rule against federal hearings is

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[7] (...continued)
matters is whether the facts related to a claim were developed and, if they were not, whether it was the prisoner's fault or the state's fault. Moreover, the state's argument, if accepted, would generate a silly result. In the cases cited, other circuits faulted state officials and state courts for frustrating prisoners' attempts to develop the facts underlying known claims. By the state's account here, those state officials and courts would have been successful in depriving prisoners of federal hearings if they had kept prisoners from discovering substantive claims in the first place.

[8] *Walters v. Metro. Educ. Enterprises*, 519 U.S. 202, 207 (1997), quoting *Pioneer Invest. Svc. Co. v. Brunswick Assoc.*, 507 U.S. 380, 388 (1993).

inapplicable.[9] In cases of the second kind, the general prohibition is applicable and bars a federal evidentiary hearing. In cases of the third and fourth kinds, the general prohibition is applicable, but a federal hearing is still permitted if the facts tend to establish the prisoner's innocence.[10]

These four categories are sensible. If the state kept the prisoner from developing the facts, it makes sense that the general prohibition on federal hearings established by §2254(e)(2) should not apply. If the state did not prevent the prisoner from developing the facts and it was the prisoner's own fault that the facts did not come out, it makes sense that the general prohibition should operate. But then,

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[9] Congress has never enacted affirmative statutory standards prescribing the circumstances in which federal habeas courts must or should conduct evidentiary hearings. Instead, Congress has been content with the standards that this Court has established. *See, e.g., Blackledge v. Allison*, 431 U.S. 63 (1977); *Townsend v. Sain*, 372 U.S. 293 (1963). Those standards continue to govern cases in which §2254(e)(2) does not bar a federal hearing.

[10] Subparagraph (A)(i) provides for an exception with respect to facts related to novel claims. Subparagraph (A)(ii) provides for an exception with respect to facts related to conventional claims when those facts were not discoverable by the exercise of diligence. Subparagraph (B) prescribes the extent to which the facts must relate to innocence, if an exception under either subparagraph (A)(i) or subparagraph (A)(ii) is warranted. The requirements established by subparagraph (B) are more demanding than anything this Court has thought to be warranted to avoid a forfeiture because of default -- in this or any context. *Cf. Schlup v. Delo*, 513 U.S. 298 (1995)(adopting a less demanding rule for successive petition cases in which prisoners have already had one opportunity to litigate in federal court). In some instances, the combination of subparagraphs (A) and (B) may raise constitutional questions. Those provisions appear to bar a federal hearing if the facts could have been discovered earlier no matter *how* clear it is that the prisoner is actually innocent; they also bar a federal hearing even if the facts could not have been discovered earlier unless the prisoner ties those facts to innocence in an extremely strong way.

in some circumstances, it also makes sense to allow exceptions to the general rule, especially if the facts in issue demonstrate that the prisoner may well be innocent. Accordingly, it makes sense to permit an exception if the prisoner failed to develop the facts regarding a novel claim that the federal court can enforce retroactively. It equally makes sense to allow an exception if the prisoner was unable to develop the facts regarding a more conventional claim even though he or she exercised diligence.

By contrast, the circuit court's strict liability interpretation attributes to Congress a blind intention to establish a general rule against federal hearings that comes into play even when the state was responsible for flawed state proceedings. That interpretation does a disservice to the legislative branch. It is especially objectionable here, where another perfectly sensible construction is available. As this Court has observed, a statute's terms should ordinarily be read "to contain that permissible meaning which fits most logically and comfortably into the body of both previously and subsequently enacted law . . . [in order to] make sense rather than nonsense out of the *corpus juris*."[11]

Initially, the circuit court acknowledged Mr. Williams' argument that this case fits the first category. At that point in its opinion, the circuit court appeared to recognize that §2254(e)(2) does not saddle prisoners with strict liability and that when inadequate state fact-finding is ascribable to the state, the general rule against federal hearings is not triggered.[12] Yet, as the circuit court proceeded, it nonetheless

[11] *West Va. Univ. Hosp. v. Casey*, 499 U.S. 83, 100-01 (1991).

[12] The court cited *Cardwell v. Greene*, 152 F.3d 331 (4th Cir.), *cert. denied*, 119 S.Ct. 587 (1998), in which another panel of the Fourth Circuit had previously adopted the interpretation that other circuits have placed on §2254(e)(2). Yet, the court failed to appreciate the implications of *Greene's* rejection of the strict liability construction.

blamed Mr. Williams for the state's defaults in this case and thus employed the strict liability construction in fact, if not in name.

The circuit court fundamentally misunderstood the role that a prisoner's efforts play in determining whether the state was at fault for inadequate state fact-finding. Other circuits have explained that the state cannot be said to have failed to develop the facts if the prisoner did not "diligently" pursue avenues for state court litigation.[13] The point is unremarkable: State authorities cannot be faulted for refusing to grant a prisoner investigative help, discovery, or a hearing, if the prisoner did not ask for those things. Only the circuit court below has held, however, that the prisoner can be faulted for not uncovering facts that the state concealed.[14]

If this case had arisen in another circuit, the first order of business would have been to decide whether it was the state's fault that the facts were not developed in state court. To make that determination, it would have been entirely reasonable to inquire whether Mr. Williams properly asked for the state's aid in developing the facts or whether the state improperly withheld relevant facts in its possession. In this case, by contrast, the circuit court proceeded in an entirely different way. It implicitly recognized that the state inter-

[13] *See* cases cited in n.6, *supra*.

[14] It can be confusing to use the term "diligence" to describe a prisoner's threshold duty to give the state a chance to determine the facts. Subparagraph (A)(ii) uses that same "diligence" term to describe an exception to the general prohibition on federal hearings -- an exception that can come into play only if a federal court first determines that it was the prisoner's fault, not the state's, that the facts were not developed earlier. Yet, the substance of the point is noncontroversial: Under the new statute, a federal court will hold the prisoner responsible for failing to develop the facts if the prisoner did not invoke the state's fact-finding machinery.

fered with Mr. Williams' efforts to discover and develop the facts, but then condemned Mr. Williams for *failing to overcome the state's interference*.

By the circuit court's account, Mr. Williams should not have relied on the state to tell him about the psychological report on Mr. Cruse. Instead, he should have suspected that a report of that kind existed but had not been placed in the official file. By the circuit court's account, Mr. Williams should not have relied on Ms. Stinnett to tell the whole truth in answering questions on *voir dire*. Instead, he should have suspected that she was providing something less than the whole truth and should have attempted to verify her story by independent investigation. And by the circuit court's account, Mr. Williams should not have relied on the prosecutor to correct any misunderstanding of which he was aware. Instead, Mr. Williams should have suspected that Mr. Woodson was sitting silent in the court room, knowing that Ms. Stinnett was omitting critical facts from her answers.

By making those demands of Mr. Williams, the circuit court missed the point of the threshold inquiry into whether Mr. Williams or the state was at fault for inadequate state fact-finding.[15] State-created obstacles are not to be confused with ordinary difficulties that litigants face when they investigate the factual basis for legal claims (*e.g.*, elusive or uncooperative private witnesses, faded memories, etc.). State-created obstacles are qualitatively distinct; they make the state, rather than the prisoner, responsible. *Strickler v. Greene*, 527 U.S. __, 119 S.Ct. 1936, 1949 n.23 (1999)(explaining that a prisoner could not be faulted for lack of "diligence" if he relied on the state's official file to contain all *Brady* materials the state was obligated to disclose). Under §2254(e)(2), the prisoner is not charged with the obligation to fight through state impediments to developing the facts. If the state interferes with the prisoner's fact-finding efforts, the general statutory rule against federal hearings is inapplicable.[16]

[15] The state was manifestly responsible for its failure to provide Mr. Williams with the report on Mr. Cruse and for Mr. Woodson's failure to correct Ms. Stinnett. *See Amadeo v. Zant*, 486 U.S. 214 (1988)(finding "cause" where state officials had concealed materials that would have alerted the defense to a constitutional claim).

By refusing to give state interference the effect the statute requires, the circuit court below reached the erroneous decision that this case does not fit the first category. Accordingly, the circuit court erroneously decided that the general rule against federal hearings applies. Proceeding on that erroneous premise, the circuit court reached the further erroneous conclusion that this is an ordinary second-category case in which a federal hearing is foreclosed.

The circuit court did pause to consider whether this case might fit the fourth category, governed by subparagraph (A)(ii). But at that point, the circuit court only compounded its previous errors. In cases properly governed by subparagraph (A)(ii), a prisoner may obtain an exception to the general rule by showing that he or she exercised diligence but that the facts were still not discoverable earlier. The circuit court thus asked whether Mr. Williams might have turned up the facts relating to his claims if he had been more diligent. In so doing, however, the circuit court again errone-

[16] This does not mean that prisoners can routinely shift the blame for inadequate fact-finding to the state by filing boilerplate motions for discovery and hearings, devoid of any attempt to identify the facts they wish to develop. It does mean, however, that if the state prevents a prisoner from discovering legal claims or facts that support those claims, the prisoner is not accountable under §2254(e)(2) for the flawed state fact-finding that ensues. In this case, Mr. Williams did not file blunderbuss motions in order to be in a position to fault the state for failing to develop the facts. He did what he could, but was "repeatedly rebuffed" by state authorities. *Williams v. Netherland*, 6 F.Supp.2d at 547.

ously faulted Mr. Williams for not overcoming the obstacles the state put in his way.

Even in fourth-category cases governed by subparagraph (A)(ii), the diligence that a prisoner must demonstrate does not extend to surmounting state interference. If it did, it could not be reconciled with §2254(e)(2)'s threshold provision making the general rule against federal hearings inapplicable where the state was at fault. It would scarcely make sense for this new statute to provide that a prisoner can obtain an exception to the general rule only by defeating conditions that make that rule inapplicable in the first place.

In this case, the district court found that Mr. Williams did what he could to engage state fact-finding machinery, but that the state refused to cooperate. This, then, is a case that fits the first category recognized by §2254(e)(2) -- that is, a case in which it was the state's fault that the facts were not developed in state court. The general prohibition on federal hearings established by §2254(e)(2) is therefore inapplicable.

II. THE STRICT LIABILITY CONSTRUCTION CONFLICTS WITH THE PURPOSE OF THE NEW STATUTE

The strict liability construction of §2254(e)(2) cannot be reconciled with the statute's purpose to encourage effective litigation in state court. Section 2254(e)(2) is a procedural default rule. It imposes a penalty on the party responsible for inadequate state fact-finding.

By allowing federal hearings where the state was responsible for inadequate state fact-finding, the statute encourages the states to discharge their duty to perform the basic fact-finding function in the first instance. By generally prohibiting federal hearings where the prisoner was at fault, the statute encourages prisoners to take advantage of

the opportunities for state litigation made available to them. And, by allowing federal hearings where the facts could not have been discovered despite the prisoner's diligence, the statute ensures that prisoners who may actually be innocent are not deprived of effective federal adjudication.

The circuit court's strict liability construction defeats §2254(e)(2)'s incentive structure. It pays no attention to *why* the facts were not developed in state court and thus distributes burdens and benefits in a way that is, at best, arbitrary and, at worst, perverse. The strict liability interpretation dispenses burdens arbitrarily inasmuch as it penalizes the prisoner for shortcomings in the record for which the state was responsible. It dispenses benefits perversely inasmuch as it allows a state to "insulate its decisions from collateral attack in federal court by refusing to grant evidentiary hearings in its own courts."[17]

There is little hard evidence regarding the meaning that Congress expected this Court to place on the various provisions in AEDPA. Yet, it is widely recognized that the general, overarching purpose was to ensure that federal habeas corpus does not unduly interfere with the adjudication of federal claims in state court. The working idea was that the states ordinarily do an acceptable job of enforcing federal rights. Or, at least, that the states are willing to enforce federal rights, if given the opportunity to do so. That premise holds only if the states discharge the responsibilities that Congress thinks they should have. It is therefore untenable to read §2254(e)(2), or any other provision in AEDPA, to invite the states to shirk their responsibilities and *still* deny prisoners an opportunity for effective adjudication in federal court.

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[17] *Burris v. Parke*, 116 F.3d at 259 (explaining that "[n]othing in §2254(e) or the rest of AEDPA implies that states may manipulate things in this manner").

III. THE STRICT LIABILITY CONSTRUCTION IGNORES THE EXTENT TO WHICH THE NEW STATUTE INCORPORATES PRIOR DOCTRINE

The circuit court below overlooked the extent to which §2254(e)(2) borrows from the body of pre-existing doctrine established by this Court. When a statute employs terms that have "accumulated settled meaning," it should be inferred that the statute "means to incorporate" that established meaning.[18] Concomitantly, when a statute adopts terms from an existing body of learning, it should be inferred that it adopts the "cluster of ideas" that were attached to those terms in the context from which they were taken.[19] In this instance, §2254(e)(2) employs essentially the same terms that this Court used in *Keeney v. Tamayo-Reyes*, 504 U.S. 1, to codify an idea that was central to the procedural default rule that the Court established in that case -- namely, the idea that prisoners should not be held accountable for state interference with fact-finding in state court.

In *Tamayo-Reyes*, this Court recognized that, in some instances, the facts underlying federal claims were not developed in state court because prisoners "*negligently failed* to take advantage of opportunities in state-court proceedings." *Id.* at 9 (emphasis added). The Court held that a prisoner's "[negligent] *failure to develop the facts* in state-court proceedings" precluded a federal evidentiary hearing, unless the prisoner either showed "cause" and "prejudice," or demonstrated that the state court's failure to conduct a hearing probably resulted in the conviction of an innocent

[18] *NLRB v. Amax Coal Co.*, 453 U.S. 322, 329 (1981).

[19] *Molzof v. United States*, 502 U.S. 301, 307 (1992), quoting *Morrisette v. United States*, 453 U.S. 322, 329 (1981).

person. *Id.* at 11-12 (emphasis added).[20] A prisoner could establish "cause," in turn, by showing that "*interference by state officials*" prevented the development of the facts. *Id.* at n.5, quoting *Murray v. Carrier*, 477 U.S. 478, 488 (1986) (emphasis added).[21]

Section 2254(e)(2), enacted only four years after *Tamayo-Reyes*, employs similar language to capture a similar idea. In *Tamayo-Reyes*, the Court penalized the prisoner only if he or she "negligently failed" to develop the facts in state court. Obviously, a prisoner could not be charged with negligence if the state itself was at fault. Accordingly, under *Tamayo-Reyes*, a prisoner who showed state interference with state fact-finding could not be denied a federal hearing.

Similarly, §2254(e)(2) triggers a general statutory rule against federal hearings only if the "applicant . . . failed to develop the factual basis of a claim." In light of *Tamayo-Reyes*, that reference to a prisoner's failure can only be read to mean a negligent, blameworthy default on the prisoner's part. Accordingly, under the new statute, as under *Tamayo-Reyes*, a prisoner is not to be denied a federal hearing if the state frustrated his or her attempts to develop the facts in state court.

[20] To be precise, the court explained that a prisoner could obtain a federal hearing by showing either "cause" and "prejudice" or that the denial of a hearing would work a "miscarriage of justice." *Id.* According to the case law, a prisoner can demonstrate a "miscarriage of justice" by showing that a violation of federal law "probably resulted in the conviction of one who is actually innocent." *Murray v. Carrier*, 477 U.S. 478, 496 (1986).

[21] *See also Coleman v. Thompson*, 501 U.S. 722, 754 (1991)(explaining that mistakes by counsel in state court can count as "cause" if they rose to the level of ineffective assistance in the constitutional sense -- a matter for which the state is responsible).

Although *Tamayo-Reyes* treated the state's responsibility for flawed state fact-finding as "cause" for allowing a federal hearing notwithstanding a prisoner's negligent failure to develop the facts, it does not follow that the new statute operates in the same way. By contrast, it is far more sensible to read §2254(e)(2) to fold its treatment of state responsibility into the baseline condition for invoking the general rule against federal hearings in the first instance: If it was the state's fault that the facts were not developed, the general rule is not triggered.

Certainly, it cannot be true that §2254(e)(2) initially holds the prisoner strictly liable for inadequate fact-finding, mindlessly triggers a general rule against federal hearings irrespective of why the facts were not developed in state court, and then attends to state interference only as an exception to that general statutory rule. If that *were* true, then every case involving flawed state fact-finding would be governed by the provisions in subparagraphs (A) and (B). And no prisoner would be able to obtain a federal evidentiary hearing without proving his or her actual innocence in an extremely strong way.

That result would depart fundamentally from the framework this Court adopted in *Tamayo-Reyes*. In that case, the Court explained that a federal hearing could be held where the prisoner showed "cause" and "prejudice," without independently demonstrating probable innocence. 504 U.S. at 11-12. Equally, the Court explained that a prisoner who established probable innocence could obtain a hearing without showing "cause." *Id.* It is inconceivable, then, that §2254(e)(2) simply bars all federal evidentiary hearings irrespective of what happened in state court, unless prisoners

make a showing that goes well beyond probable innocence.[22]

Both *Tamayo-Reyes* and the new statute make state responsibility for inadequate fact-finding a crucial element of the analysis. By contrast, the circuit court's strict liability construction of §2254(e)(2) makes nothing of state responsibility at all. It treats the new statute as a radical departure from *Tamayo-Reyes* and permits the state to frustrate fact-finding in state court and then to insist that the prisoner should have managed to surmount the state's interference. No principles of statutory construction warrant that untenable construction of this new statute.

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[22] Of course, §2254(e)(2) does work prejudice and innocence into the new statutory framework. But it does so when, and only when, the prisoner rather than the state was at fault for inadequate state fact-finding, and, accordingly, when the general rule against federal hearings is triggered. In cases of that kind, §2254(e)(2) requires the prisoner to satisfy both subparagraphs (A) and (B).

CONCLUSION

For the reasons stated above, this Court should reverse the circuit court judgment.

Respectfully submitted,

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